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No. 06-1628

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In The

Supreme Court of the United States

DAVID ARNAL,

Petitioner,

v.

LAURA LAWTON FRASER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, create a private cause of action in federal court to determine which of two conflicting state court child custody orders is valid, and if it does, are there conflicting state court child custody orders in this case?

II. Does the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B, create a private cause of action in federal court to determine which of two conflicting state court child support orders is valid, and if it does, are there conflicting state court child support orders in this case?

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BASIS FOR SUPREME COURT JURISDICTION

Petitioner seeks review of a decision of the South Carolina Supreme Court, *Arnal v. Fraser*, 641 S.E.2d 419 (S.C. 2007), pursuant to 28 U.S.C. § 1257(a). Respondent submits that such review is foreclosed by *Thompson v. Thompson*, 418 U.S. 174, 108 S.Ct. 513 (1988).

STATEMENT OF THE CASE

This litigation stretches back to an Amended Final Order filed in the family court in Beaufort County, South Carolina on October 17, 2001. (Pet. App. 37-62) Among other things, by that order Respondent Laura Lawton Fraser (Mother) was awarded sole custody of the parties' minor child, Samuel, and Petitioner David Arnal (Father) was ordered to pay child support.

The parties cross-appealed a number of issues, including the amount of visitation Father had been awarded, which the South Carolina Court of Appeals resolved in *Arnal v. Arnal*, 609 S.E.2d 821 (S.C. Ct. App. 2005). The South Carolina Supreme Court granted certiorari to address five issues from the Court of Appeals' decision and affirmed the Court of Appeals, with modification, in *Arnal v. Arnal*, 636 S.E.2d 864 (S.C. 2006).

While the first appeal was still pending, Father filed the current action (Case No. 2003-DR-07-183) in the Beaufort County family court on February 10, 2003. In his complaint, Father requested a reduction of his child support obligation and certain other relief. (Pet. App. 68-71) Mother counterclaimed for an increase in child support and certain other relief. (Pet. App. 72-78)

After Father filed the February 2003 action, numerous hearings were held to address motions and rule to show cause actions, primarily dealing with Father's intransigence in refusing to obey the Amended Final Order. Four orders subsequently issued in that action were the subject of a second appeal by Father, which was certified directly to the South Carolina Supreme Court. That appeal resulted in the South Carolina Supreme Court's decision filed on January 22, 2007, *Arnal v. Fraser*, 641 S.E.2d 419 (S.C. 2007).

In the second appeal, Father claimed, for the first time during the appeal, that the Beaufort County family court lacked subject matter jurisdiction over his own action when he filed it in February 2003, citing the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (PKPA). Father later expanded on this theory during the appeal by also claiming that the Beaufort County family court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act, S.C. Code Ann. §§ 20-7-782 to -830 (1985) (UCCJA).

In his ever evolving strategy, Father has now abandoned his UCCJA argument but has added in his petition to this Court a new claim that the Beaufort County family court also lacked subject matter jurisdiction under the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (FFCCSOA). Because this newly minted claim arose after the South Carolina Supreme Court issued its decision in the second appeal, it is of course not discussed in that decision.

After Mother filed her appellate brief, citing authority that the PKPA and UCCJA apply only when there are conflicting custody orders from different states, Father on

October 31, 2006 filed a petition in the district court for Transylvania County, North Carolina for registration of the October 17, 2001 Amended Final Order of the Beaufort County family court. However, the only relief Father sought in that action was that the South Carolina order "be registered as an order of this Court and be given full faith and credit." (Pet. App. 82) At the time Father filed this petition in North Carolina, Mother and the child had moved back to and been living in South Carolina for over two years.

In the second appeal, the South Carolina Supreme Court determined that the Beaufort County family court continued to have jurisdiction under both the PKPA and the UCCJA. *Arnal v. Fraser*, 641 S.E.2d 419, 421-422 (S.C. 2007). It nevertheless concluded that two of the appealed orders had affected Father's visitation while the issue of visitation remained a subject of the first appeal and that these were therefore void pursuant to Rules 205 and 225 of the South Carolina Appellate Court Rules. *Id.* 641 S.E.2d 419, 421-422.

Although as part of the second appeal Father made belated allegations about the residence of Mother and the child, no finding has ever been made by any court that either Mother or the child is a resident of North Carolina, or that either was a resident of North Carolina when Father commenced this action in South Carolina on February 10, 2003.

REASONS FOR DENYING THE PETITION

I. THE PARENTAL KIDNAPPING PREVENTION ACT, 28 U.S.C. § 1738A, DOES NOT CREATE A PRIVATE CAUSE OF ACTION IN FEDERAL COURT TO DETERMINE WHICH OF TWO CONFLICTING STATE COURT CHILD CUSTODY ORDERS IS VALID, BUT EVEN IF IT DID THERE ARE NO CONFLICTING STATE COURT CHILD CUSTODY ORDERS IN THIS CASE.

While understandably trying to avoid the appearance of doing so, Father asks the Court to overturn *Thompson v. Thompson*, 418 U.S. 174, 108 S.Ct. 513 (1988), which holds that the PKPA did not create a private federal cause of action to resolve conflicting state court custody orders. Indeed, Father goes a giant step further than that, asking the Court to directly intervene concerning a state *visitation* order he is unhappy with *even when there is no interstate conflict at all concerning that order.*

The only connection any court in North Carolina has ever had in this case is when Father belatedly tried to manufacture an interstate conflict by filing the petition in Transylvania County, North Carolina on October 31, 2006. (Pet. App. 79-84) This was more than three and a half years after Father had commenced the underlying litigation in Beaufort County in February 2003, long after the Beaufort County family court had issued the orders which were the subject of the second appeal, and long after Mother and the child had moved back to South Carolina. North Carolina has never accepted jurisdiction over any aspect of this matter, much less issued any orders in the case, conflicting or otherwise, and there is no reason to suppose it ever will.

Father's argument that "The PKPA and the UCCJA . . . were not enacted merely to resolve multistate jurisdictional

conflicts but also to prevent them from occurring in the first place," (Petition, p. 18) even if correct, could have no application where there is not now and has never been any multistate jurisdictional conflict to begin with. Father never encountered a jurisdictional conflict with Mother when he brought this action, so regardless of whether a secondary purpose of the PKPA and the UCCJA is to prevent multistate jurisdictional conflicts from occurring in the first place, such a prophylactic proved unnecessary in this case. Father is not attempting to use the PKPA *to prevent* a jurisdictional conflict, he is attempting to use it *to create* one.

As noted, it was Father himself who brought the present modification action of the Amended Final Order in South Carolina on February 10, 2003. (Pet. App. 67-71) Only after he failed to obtain the relief he wanted did Father raise the issue of South Carolina's jurisdiction under the PKPA and UCCJA. Declaring that South Carolina lacked jurisdiction under these circumstances would not only require the Court to overrule *Thompson*, it would require the Court to go much further. It would be an open invitation to disgruntled litigants to challenge state court custody orders in federal court after they had already voluntarily participated in the state court action and lost, even when there was no competing custody order issued by another state. Far from preventing jurisdictional disputes, this would present stunning vistas of new opportunity for parties such as Father to dream up phony ones as a standard feature of custody litigation strategy.

In *Thompson*, the petitioner hoped to better his chances of obtaining relief from the Court by carefully narrowing his request for federal court intervention "only in cases of an actual conflict between two state custody decrees . . . " 484 U.S. at 186, 108 S.Ct. at 519. The Court

unanimously rejected even that far more modest request, determining that Congress simply did not intend to grant such relief when it enacted the PKPA: "Instructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state-law questions that they have little expertise to resolve. That is a cost that Congress made clear it did not want the PKPA to carry." 484 U.S. at 186, 108 S.Ct. at 519. Yet here, Father asks the Court to play Solomon where there are *no conflicting custody orders at all*, choosing between an order from South Carolina and a *nonexistent* order from North Carolina. There is not even a case or controversy presented, only hypothetical questions. It is even clearer that saddling the federal judiciary with the burden of responding to such queries, however fascinating Father may find them to be, is a cost Congress did not want the PKPA to carry.

The fact that Father is asking for review by this Court rather than by a federal district court, as was requested in *Thompson*, is of course not a meaningful distinction. If the PKPA does not afford litigants the right to federal court review of state court judgments, then clearly that includes review in all federal courts: "Petitioner essentially asks that federal district courts exercise appellate review of state-court judgments. This is an unusual cause of action for Congress to grant, either expressly or by implication." 484 U.S. at 187, 108 S.Ct. at 520, footnote 5. The only avenue for review left open by the Court in *Thompson* is in its statement that "ultimate review remains available in this Court for truly intractable jurisdictional deadlocks." 484 U.S. at 187, 108 S.Ct. at 525. Quite obviously, if the facts in *Thompson* did not present a truly intractable jurisdictional deadlock, where there actually *were*

conflicting custody decrees issued by California and Louisiana, then there is no such intractable deadlock here, where there are no conflicting custody decrees at all.

II. THE FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS ACT, 28 U.S.C. § 1738B, DOES NOT CREATE A PRIVATE CAUSE OF ACTION IN FEDERAL COURT TO DETERMINE WHICH OF TWO CONFLICTING STATE COURT CHILD SUPPORT ORDERS IS VALID, BUT EVEN IF IT DID THERE ARE NO CONFLICTING STATE COURT CHILD SUPPORT ORDERS IN THIS CASE.

Father's argument based on the FFCCSOA is simply a reiteration of his argument based on the PKPA, merely substituting a different statutory provision for the PKPA, and the holding of *Thompson* applies with equal force and for the same reasons.

Not only did Father never raise the FFCCSOA in any court action in South Carolina, including the South Carolina Supreme Court, there is not even an allegation that there are conflicting interstate child support orders.

Just as with the PKPA, an examination of the FFCCSOA fails to reveal any intention, either express or implied, on the part of Congress to afford state court litigants a right to federal court review of conflicting state child support orders, but even if it did there are no conflicting state child support orders to be sorted out.

CONCLUSION

For the foregoing reasons, Mother respectfully requests that the Petition be denied.

Respectfully submitted,

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